

No. 1-14-2680

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FIRST 38, LLC, an Illinois Limited Liability Company,)	Appeal from the
)	Circuit Court of
Plaintiff/Counter-Defendant-Appellee,)	Cook County,
)	
v.)	
)	
NM PROJECT COMPANY LLC,)	No. 14 CH 09942
PRISM REAL ESTATE EQUITIES V, LLC, and)	
664 N. MICHIGAN LLC,)	
)	
Defendants/Counter-Defendants,)	Honorable
)	Diane J. Larsen,
And)	Judge Presiding.
)	
HOLLY GERACI and PETER GERACI,)	
)	
Defendants/Counter-Plaintiffs-Appellants.)	
.)	

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Pursuant to the terms of the right of first refusal agreement (ROFR) between holder and seller for the purchase of a penthouse unit, seller did not owe holder a duty to provide evidence of the earnest money deposit made by third party offeror in its bid to purchase the unit, where the ROFR required only that seller notify holder of "an acceptable bona fide offer" on the unit and deliver a copy of said offer to holder.

¶ 2 This appeal arises from an action in equity concerning who is entitled to purchase the 40th floor penthouse unit (PH1) at The Residences Condominium on the Magnificent Mile located at 664-670 North Michigan Avenue and 118 East Erie Street (Ritz-Carlton Residences). Plaintiff, First 38 LLC (First 38), filed a verified complaint for temporary, preliminary and permanent injunctive relief, seeking to enforce the terms of a right of first refusal for the purchase of PH1 and to enjoin the sale of the unit to defendants, Peter Geraci and his wife, Holly (the Geracis). The Geracis filed a counterclaim and moved to enjoin First 38 from purchasing the same unit. On September 3, 2014, following a bench trial, the circuit court entered a memorandum opinion and order in which it ruled in favor of First 38 and against the Geracis and other defendants. The Geracis timely appealed.¹ As explained below, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 A. The Parties

¶ 5 First 38, an Illinois limited liability corporation, is the owner of Unit 38L in the Ritz-Carlton Residences and is the holder of the right of first refusal for the purchase of both PH1 and Penthouse 2 (PH2), condominium units located on the 40th and 39th floor of the building, respectively. First 38 negotiated for the right of first refusal to purchase PH1 and/or PH2 at the time that it purchased Unit 38L from the seller of the aforementioned units.

¶ 6 The Geracis are Illinois residents who submitted a written offer to purchase PH1 on or about June 2, 2014. The Geracis do not reside in any unit of the Ritz-Carlton Residences.

¶ 7 The other named defendants, NM Project Company, LLC (NMPC), Prism Real Estate Equities V, LLC (Prism) and 664 N. Michigan LLC (664 N. Michigan), are business entities collectively engaged in the marketing and sale of PH1. NMPC, a Delaware corporation, is the

¹ The Geracis are the only defendants who filed a notice appeal in this matter.

seller of PH1 and other units in the Ritz-Carlton Residents. Prism, an Illinois limited liability company, is the manager of NMPC. 664 N. Michigan, a Delaware corporation, is the authorized representative of NMPC.

¶ 8

B. The Right of First Refusal

¶ 9 On or about September 2, 2013, German Larrea, an individual who is not a party to the lawsuit, and NMPC entered into a one-page agreement entitled "Mutual Agreement of Terms for Residence 38L and Two Deeded Parking Units between German Larrea, as Buyer and NM Project Company LLC, as Seller" (Mutual Agreement) that set forth, among other things, the purchase price, monthly assessments fees, and the number of deeded parking spaces related to the purchase of Unit 38L at the Ritz Carlton Residences. Pursuant to the Mutual Agreement, NMPC granted Larrea a right of first refusal for the purchase of PH1 and/or PH2, as follows:

"Seller, will provide the Buyer Right of First Refusal for Penthouse 1 and Penthouse 2, (floors 40 and 39). Buyer will have 24 hours to execute an agreement to match any acceptable, existing offer presented to the Seller."

The Mutual Agreement was signed by Jon K. Rodgers, as Managing Member of NMPC, and Luis Castelazo, as agent of First 38.

¶ 10 On or about September 12, 2013, First 38 and NMPC entered into a "Condominium Purchase Agreement for The Residences Condominium on the Magnificent Mile and the 670 Parking Condominium" (Unit 38L Purchase Agreement).² Attorney David Goldstein represented First 38 in its purchase of Unit 38L, which closed on or about December 30, 2013.

² While the buyer under the Unit 38L Purchase Agreement is First 38 and the buyer under the Mutual Agreement is Larrea, both contracts were signed by Castelazo, as the authorized representative.

¶ 11 On December 27, 2013, prior to the closing, NMPC's attorney, Daniel Loewenstein, sent an e-mail to First 38's attorney, Goldstein, with a revised version of the right of first refusal (ROFR), and proposed that First 38 and NMPC each execute a copy of the e-mail to indicate its respective acknowledgment and agreement to the terms of the ROFR, as revised. Both parties executed copies of the e-mail. Schultz signed on behalf of Prism, as manager of 664 N. Michigan acting on behalf of NMPC, and Castelazo signed on behalf of Kinnardway Overseas Limited, First 38's sole member. The ROFR provides as follows:

"The Seller [NMPC] agrees that it will not sell the Penthouse 1 or Penthouse 2 (floor 40 and 39, respectively) (the 'Additional Units') in the Residential Condominium Development, or any portion thereof without first offering to the Purchaser [First 38] a right of first refusal to purchase said property (the 'Right of First Refusal'), on the following terms and conditions:

A. Upon receipt of an acceptable bona fide offer to purchase the Additional Units or any portion thereof, the Seller shall notify the Purchaser of a third party offer ('Third Party Offer') and deliver to Purchaser a copy thereof, executed by the third party purchaser, but with the name (and contact or other personal information, if any) of the third party purchaser redacted as necessary for confidentiality purposes.

B. Provided Purchaser elects to match the Third Party Offer, Purchaser must execute the Seller's standard

Condominium Purchase Agreement ('CPA') with the same terms and conditions as the Third Party Offer, within one (1) business day after Purchaser has been notified in writing of the Third Party Offer and received an executed copy of the offer; and

C. If Purchaser elects not to match the Third Party Offer and Seller does not convey title to the Additional Units or any portion thereof to said third party in the Third Party Offer (or its nominee), then Purchaser shall have a continuing Right of First Refusal to match each additional Third Party Offer until all of the space comprising the Additional Units are sold and conveyed out to one or more third parties."

¶ 12 C. The Offer to Purchase PH1 (June 2, 2014)

¶ 13 On or about June 2, 2014, the Geracis tendered a written offer to NMPC for the purchase of PH1, which was memorialized in a form agreement entitled "Condominium Purchase Agreement" (PH1 Purchase Agreement) that was similar to the one executed by First 38 for its purchase of Unit 38L. Accompanying the PH1 Purchase Agreement was a 5-page addendum entitled "Rider A" which included a written acknowledgement that "a present unit owned in the Building has a right to purchase the Unit [PH1]" and that the PH1 Purchase Agreement was subject to "that unit owner waiving such right of first refusal after the unit owner receives the required notice of this sale."

¶ 14

1. NMPC's Notice of the Offer (June 3, 2014)

¶ 15 On June 3, 2014, Loewenstein sent a letter to Goldstein, via e-mail, facsimile, and messenger, stating, in part, the following:

"In accordance with the agreement with regard to [the] right of first refusal, please be advised that NM Project Company, LLC has received a Third Party Offer with regard to Penthouse 1 which is acceptable to NM Project Company, LLC. Accordingly, First 38 LLC is hereby notified of such acceptable offer. In accordance with the Right of First Refusal Agreement, a copy of the acceptable bona fide offer (the "Third Party Offer") executed by the third party purchaser, but with the name and other contact and personal information redacted, is enclosed herewith.

Please advise the undersigned as soon as possible whether your client intends to proceed with the purchase of Penthouse 1. As you are aware, if your client elects to match the Third Party Offer, it must execute Seller's Standard Condominium Purchase Agreement on the same terms and conditions as the Third Party Offer within one (1) business day after this notification."

¶ 16 Enclosed with Loewenstein's June 3 letter was a copy of the PH1 Purchase Agreement, with the identifying information of the offeror/purchaser, such as the signature and initials of the offeror/purchaser, redacted. The PH1 Purchase Agreement indicated that the bid made by the third party offeror was \$8,632,000. According to the terms of the contract, an earnest money deposit of \$862,300 was required to secure the contract, and the closing date was scheduled for June 25, 2014.

¶ 17 2. First 38's Response to Notice of the Offer (June 4, 2014)

¶ 18 On June 4, 2014, Goldstein responded to Loewenstein's notification of the offer on PH1 in a letter transmitted by e-mail and messenger delivery, stating the following:

"In accordance with the Right of First Refusal Agreement ('Agreement'), please be advised that we have received on behalf of our client, First 38 LLC, the Third Party Offer with regard to Penthouse 1. In accordance with the terms of the Agreement, your [sic] are hereby notified our client elects to match the Third Party Offer and is ready and willing to execute Seller's Standard Condominium Purchase Agreement on the same terms and. [sic] conditions as the Third Party Offer. In order to accomplish this, please immediately forward to this office a copy of the Standard Condominium Purchase Agreement."

¶ 19 Later that same day, at 5:08 p.m., Goldstein sent another e-mail communication to Loewenstein, indicating that his client, First 38, intended "to sign and return [the documents] today," but desired a copy, that day, of the "Third Party Offer signed by said purchaser with the name of said purchaser not redacted." A few minutes later, at 5:14 p.m., Loewenstein responded to the request, indicating that NMPC "has a contractual obligation that prevents such disclosure."

¶ 20 A few hours later, at 9:19 p.m., Goldstein again e-mailed Loewenstein to explain that his client was "questioning the validity of the Third Party Offer." Goldstein again asked for a non-redacted copy of the Third Party Offer, *i.e.*, the PH1 Purchase Agreement.³ Goldstein said that his client believed that the copy of the PH1 Purchase Agreement sent by Loewenstein, "as

³ For purposes of clarity, we refer to the June 2, 2014 document submitted by the Geracis as the PH1 Purchase Agreement, and refer to the "Third Party Offer" when referencing the obligation under the ROFR or where the parties specifically use that term in their arguments.

presented, is not a valid offer" without the non-redacted information. Goldstein additionally requested that Loewenstein "prove [] the proposed purchaser has the ability to close."

¶ 21 3. Subsequent Demands for Disclosure

¶ 22 On June 5, 2014, Loewenstein sent a letter to Goldstein, via e-mail, facsimile, and messenger, in which he acknowledged First 38's requests for "a non-redacted copy of the Third Party Offer disclosing the name of the offeror and its ability to close on the purchase of PH1." Loewenstein explained that he would not send a non-redacted copy of the third party's offer on PH1 because the ROFR "clearly provides that the name and contact or other personal information, if any, of the Third Party Offeror is to be redacted for confidentiality purposes." Additionally, he pointed out, the PH1 Purchase Agreement included a confidentiality provision that precluded NMPC from disclosing the third party offeror's identity.

¶ 23 Loewenstein concluded by reminding Goldstein "that the earnest money deposit of \$862,300 along with an executed Contract [from First 38] *** must be received by my client by no later than 5:00 p.m. CDT" that day (June 5). Loewenstein added that if NMPC did not receive First 38's "earnest money and executed documents by 5:00 p.m. CDT," NMPC would consider the ROFR terminated as to this particular third party offer "without further notice."

¶ 24 Later that day, at 4:57 p.m., Goldstein responded with an e-mail communication to Loewenstein, advising him that First 38 "is unable to complete its due diligence process without the receipt of the Purchase Agreement which has not been redacted." Goldstein again requested that a non-redacted copy of the PH1 Purchase Agreement be forwarded to him.

¶ 25 On June 10, 2014, Theodore Tetzlaff, an attorney acting on behalf of First 38, sent Loewenstein a letter by fax, e-mail and regular mail, indicating that he would be representing First 38 as its legal counsel "in the matter involving First 38's right of first refusal to purchase

[PH1]." In his letter, Tetzlaff asserted that Loewenstein's "June 3, 2013 letter and attached document failed to trigger First 38's ROFR, because: 1) it did not constitute proper notice, and 2) it failed to establish the fundamental elements of a bona fide offer." Tetzlaff first pointed out that NMPC was required to send written notice of the third party offer to First 38 directly, as opposed to Goldstein, because the Unit 38L Purchase Agreement expressly provided that Goldstein's appointment "as [First 38's] agent to give and receive Notices," terminated at the closing on the Unit 38L purchase transaction. Next, Tetzlaff asserted that the copy of the PH1 Purchase Agreement sent by Loewenstein was "inadequate to trigger the ROFR" because it "lacked any evidence of actual execution or of the initial earnest money deposit." Requesting that NMPC provide evidence of the " 'existing offer' or of a bona fide offer and 'executed copy of this offer' by 5:00 p.m." the next day (June 11), Tetzlaff warned that First 38 was "prepared promptly to commence litigation to enforce First 38's rights" under the ROFR.

¶ 26 Neither Loewenstein nor any other representative of NMPC provided, by 5:00 p.m. on June 11: (1) a non-redacted copy of the PH1 Purchase Agreement executed by all of the parties and/or (2) evidence of the initial earnest money deposit.

¶ 27 **D. First 38's Complaint for Injunctive Relief**

¶ 28 On June 13, 2014, First 38 filed its Verified Complaint for Injunction, Temporary Restraining Order and Specific Performance against NMPC, Prism, 664 N. Michigan, and the Geracis⁴ (collectively defendants), as well as its Emergency Motion for Temporary Restraining Order and Preliminary Injunction. Ultimately, First 38 sought to enjoin the sale of PH1 to the Geracis, alleging that the purported "Third Party Offer" tendered to First 38 was defective because (1) it was tendered to First 38's attorney, whose appointment as its agent had allegedly

⁴ At the time of filing, First 38 was unaware of the third party offeror's identity and therefore sued the Geracis as "John Doe." For ease of discussion, we will refer to the Geracis as the named party defendant.

terminated at the closing of the sale on Unit 38L in December 2013; and (2) it did not include "any copy or proof of initial earnest money deposit attached" as referenced in paragraph 2(a)(i) of the PH1 Purchase Agreement. First 38 further alleged that the sale of PH1 to the Geracis would result in "substantial and immediate irreparable injury in that [First 38] will no longer be able to purchase [PH1] pursuant to its right of first refusal."

¶ 29 In terms of relief, First 38 requested that the circuit court grant First 38: (1) preliminary injunctive relief to prevent NMPC from accepting the Geracis' offer on PH1 and selling the unit to the Geracis; (2) a temporary restraining order (TRO) preventing NMPC from selling PH1 to the Geracis prior to a hearing on the motion for injunctive relief; and (3) specific performance, requiring NMPC to comply with the ROFR by providing First 38 with "an executed copy of the Third Party Purchase Agreement dated June 2, 2014, including the unredacted name of the third party and a copy of the initial earnest money deposit or other proof of payment." Attorneys' fees and costs were also requested. As support, First 38 attached to its motion copies of the Mutual Agreement, the Unit 38L Purchase Agreement, the executed ROFR, the written and e-mail communications between Goldstein and Loewenstein between June 3 and June 5, 2014, the redacted PH1 Purchase Agreement, and Tetzlaff's June 10, 2014 letter to Loewenstein.

¶ 30 On June 17, 2014, the circuit court granted First 38's motion in part, and entered an order temporarily restraining defendants "selling, transferring or conveying or acting on the pending offer of purchase for" PH1 "until such time as the rights of the parties may be adjudicated." The TRO was to remain in effect until June 27, 2014.

¶ 31 E. Preliminary Injunction Hearing

¶ 32 On June 24, 2014, the circuit court commenced a two-day evidentiary hearing on First 38's motion for preliminary injunctive relief. Testifying as witnesses at the hearing were

Loewenstein, Goldstein, and Schultz. On June 26, 2014, the circuit court granted First 38 a preliminary injunction. Finding that First 38 had a clearly ascertainable right, no adequate remedy at law, and a reasonable likelihood of success on the merits, the circuit court concluded that the receipt or confirmation of the Geracis' wire transfer of the earnest money deposit on their June 2 offer to purchase PH1 should have been attached to the copy of the PH1 Purchase Agreement sent by Loewenstein to Goldstein as notice of the "Third Party Offer." Following the court's ruling, NMPC asked that the preliminary injunction not prevent it from providing notice to First 38 in order to trigger the ROFR.

¶ 33 F. The Geracis' Counter-Complaint

¶ 34 On June 27, 2014, the Geracis filed a counter-complaint against First 38, NMPC, and Prism for declaratory judgment, injunction, TRO, and specific performance. The Geracis alleged that during the preliminary injunction hearing, First 38 had announced its intention to purchase PH1. As a result, NMPC intended to deliver a new notice to First 38 under the ROFR. Alleging that NMPC's delivery of a new notice violated its obligation to the Geracis under the PH1 Purchase Agreement, the Geracis asserted that the sale of PH1 to First 38 would "cause [them] immediate and irreparable harm." As a result, the Geracis also filed an emergency motion for TRO and preliminary injunction the same day. They further requested a permanent injunction enjoining NMPC and First 38 from conveying PH1 and from entering into any agreement for the purchase of PH1. Finally, the Geracis asked that the court compel NMPC to specifically perform under the PH1 Purchase Agreement by selling the penthouse unit to the Geracis.

¶ 35 On the same day, the circuit court granted the Geracis' motion for TRO, temporarily restraining First 38 and NMPC from entering into a purchase agreement for PH1 and/or closing on the sale of PH1. Bond was set in the amount of \$7,760,700 for the Geracis. The court also

released \$836,200 from the payment made by First 38. Consequently, NMPC was in possession of the earnest money from both of the prospective purchasers, the Geracis and First 38.

¶ 36 G. Circuit Court's Findings and Conclusions

¶ 37 The circuit court held a bench trial on July 10 and 11, 2014. During those two days, the circuit court heard testimony from additional witnesses, including Castelazo and Joseph Fortunato, Sr., an expert in real estate sales and contracts. The parties also agreed to have the testimony from the preliminary injunction hearing stand as testimony for purposes of the trial.

¶ 38 On September 3, 2014, the circuit court ruled in favor of First 38. In its memorandum order, the court made several detailed findings of fact and conclusions. We highlight only those findings and conclusions that we find dispositive to our review and analysis on appeal.

¶ 39 The circuit court pointed out that the PH1 Purchase Agreement explicitly stated, as part of the section entitled "Price and Terms," that the "Initial Earnest Money Deposit (10%) [was] attached to" the contract and that the evidence indicated that the Geracis had wired the earnest money deposit of \$862,300 on June 2, 2014. However, when Loewenstein sent his June 3 letter to Goldstein about the "Third Party Offer" that NMPC found to be an "acceptable, bona-fide offer," he forwarded a copy of the PH1 Purchase Agreement that was "without evidence of attached or accompanied earnest money."

¶ 40 As to First 38's exercise of its right as holder of the ROFR to exercise its right to purchase the PH1 upon notification of a "Third Party Offer," the circuit court noted that Goldstein had alerted Loewenstein to the fact that he did not believe that NMPC's tender of the PH1 Purchase Agreement complied with the seller's notice requirements under the ROFR:

"Although neither Mr. Goldstein nor anyone else associated with First 38 specifically asked for a copy of the earnest money associated with the

Third Party Offer [PH1 Purchase Agreement], Mr. Goldstein did request proof of the proposed purchaser's ability to close on PH1, as well as an unredacted copy of the Third Party Offer. [Citation.] First 38 was concerned that the Third Party Offer might be 'a phony offer.' [Citations.]"

¶ 41 Finally, after reviewing all of the evidence and witness testimony, particularly the testimony offered by Loewenstein, Schultz and Goldstein regarding the parties' negotiation of the terms in the ROFR, the circuit court determined that "[u]nder the express terms of the ROFR, First 38 was entitled to receive from NMPC a complete copy of the Third Party Offer," with the necessary redactions *and* proof of the earnest money deposit, as part of the "complete" Third Party Offer. Because an express term of the PH1 Purchase Agreement required the offeror to satisfy the earnest money deposit term in the agreement, the court held that "a complete copy of the Third Party Offer purchase agreement would necessarily require proof of the earnest money deposit whether it be a copy of a check or a printed confirmation of a wire transfer because the earnest money deposit is an integral part of the transaction." Because NMPC failed to provide such proof, the court concluded, NMPC failed to fulfill its duty to tender a copy of the "complete" Third Party Offer in accordance with the terms of the ROFR and, consequently, the notice of the offer was deficient and First 38's obligation under the ROFR was not triggered. Therefore, the court entered judgment in favor of First 38 and against defendants.

ANALYSIS

¶ 42 On appeal, the Geracis contend that: (1) the ROFR is clear and unambiguous and that the redacted Third Party Offer sent to First 38 was sufficient to trigger First 38's obligation to act under the ROFR; (2) the circuit court improperly relied on parol evidence despite the ROFR being unambiguous; (3) even if First 38 was entitled to proof of the earnest money deposit, it

waived that right; and (4) the circuit court improperly denied the Geracis' motion to compel the appearance of German Larrea.

¶ 43

A. Applicable Standard Of Review

¶ 44 The parties disagree about the applicable standard of review that should be applied to resolve their dispute on appeal. The Geracis contend that because this case involves contract interpretation, which is a question of law, this court's review should be *de novo*. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007) (the interpretation of a contract is a question of law which is reviewed *de novo*); *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 59 (whether contract language is ambiguous and requires extrinsic evidence for interpretation is a question of law subject to *de novo* review). First 38, in contrast, claims that the issue is whether NMPC properly performed under the ROFR, triggering First 38's obligation to act, a question of fact which we should review under the manifest weight of the evidence standard. See *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 72 (2006) (holding that whether a party has committed a material breach of contract is a question of fact and the circuit court's determination is subject to a manifest weight of the evidence standard). However, we cannot determine whether NMPC's actions were sufficient to trigger First 38's obligations under the ROFR until we first determine what the ROFR requires of NMPC in order to trigger First 38's obligations. Accordingly, we must first interpret the language of the ROFR, under the *de novo* standard of review. *Gallagher*, 226 Ill. 2d at 219.

¶ 45

B. Interpretation of the Right of First Refusal

¶ 46 Both parties argue that the language of the ROFR is unambiguous. According to First 38, the language in the ROFR requiring NMPC to tender "an executed copy of the offer" imposes a duty on NMPC to provide First 38 with a "complete" copy of the third party offer that it found

"acceptable" and "bona fide," which necessarily includes not just the signed PH1 Purchase Agreement, but also (proof of) the earnest money deposit, which is referenced in the PH1 Purchase Agreement as being "attached" thereto. In contrast, the Geracis argue that the ROFR refers to and requires only a copy of the "offer" itself, and that there is no language, explicit or implicit, requiring NMPC to provide the holder with proof of the offeror's earnest money deposit, regardless of language in the PH1 Agreement stating that the deposit is attached.

¶ 47 A court's primary goal in interpreting a contract is to give effect to the parties' intent "by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Midway Park Saver v. Sarco Putty Co.*, 2012 IL App (1st) 110849, ¶ 13. A contract is not ambiguous merely because parties disagree as to its meaning; rather, ambiguity exists "where the words in [the] contract are reasonably susceptible to more than one meaning." *Thompson v. Gordon*, 241 Ill. 2d 428, 443 (2011). Where an ambiguity is present, parol evidence may be admitted to aid the trier of fact in resolving the ambiguity; however, absent an ambiguity, a court interprets the contract as a matter of law without resort to extrinsic, or parol, evidence. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462-63 (1999); *Midway Park Saver*, 2012 IL App (1st) 110849, ¶ 13.

¶ 48 We note that the circuit court engaged in an extensive and thorough review of the testimony and records admitted into evidence at trial, along with the multitude of pleadings, motions, and the parties' simultaneous requests for emergency relief, sanctions, and expedited discovery. It is clear that the circuit court adjudicated a difficult dispute in a thoughtful and indefatigable, yet prompt, manner. The court's decision, as set forth in its 25-page order, provides an organized and detailed analysis of the law. However, following our review of the record, we disagree with the judgment of the circuit court for the reasons set forth below.

¶ 49 With respect to what is required by NMPC under the ROFR, the language plainly requires that NMPC will notify First 38 of a "Third Party Offer" by delivering "a copy thereof, executed by the third party purchaser, but with the name (and contact or other personal information, if any) of the third party purchaser redacted as necessary for confidentiality purposes." At the heart of this dispute is the parties' disagreement over what a "copy" of "a third party offer" includes. Under our *de novo* review, we agree that the language in the ROFR is unambiguous. We conclude that the ROFR unambiguously allows NMPC, as the seller, to determine the *bona fides* of the third party offer and that First 38, as holder, is entitled only to a copy of the offer, not the security, i.e., the earnest money deposit, that binds the offer or that makes the offer in fact "acceptable" to NMPC. As a result, we will not consider any parol evidence of the parties' negotiations or conduct surrounding the formation of the initial and revised versions of the ROFR.

¶ 50 According to the ROFR, "Upon receipt of an acceptable bona fide offer to purchase the Additional Units or any portion thereof, the Seller shall notify the Purchaser of a third party offer and deliver to Purchaser a copy thereof." The term "offer" is modified by both the term "acceptable" and "bona fide," and the offer is initially received by the seller; therefore, by its explicit terms, the ROFR gives NMPC, as the seller, the right to determine whether a third-party offer is acceptable and bona fide. Under the ROFR, once NMPC received an offer from a third party that *it* believes is made in good faith (bona fide) and acceptable to it, NMPC was required to notify First 38 of that "third party offer." It is only when NMPC determines that a third party offer is acceptable, or "worthy of being accepted,"⁵ and bona fide, or "[m]ade in good faith, without fraud or deceit,"⁶ that it is required to notify First 38 of the offer.

⁵ Merriam-Webster's Collegiate Dictionary 7 (11th ed. 2003).

⁶ Black's Law Dictionary 186 (8th ed. 2004).

¶ 51 The term "offer" is not specifically defined by the ROFR, so we must look to its plain and ordinary meaning. *Midway Park Saver*, 2012 IL App (1st) 110849, ¶ 13. Black's Law Dictionary defines an "offer" as a "display of willingness to enter into a contract on specified terms, made in a way that would lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract." Black's Law Dictionary 1113 (8th ed. 2004); see also Restatement (Second) of Contracts § 24 ("an offer is the manifestation of willingness to enter into a bargain made in such a way that another person's assent to that bargain is invited and will conclude it"). Our supreme court has also observed that the "principles of contract state that in order for a valid contract to be formed, an 'offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain.'" *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29 (1991) (quoting 1 Williston, Contracts §§ 38 through 48 (3d ed. 1957); Corbin, Contracts §§ 95 through 100 (1963)); see also *Vincent v. Doeber*, 183 Ill. App. 3d 1081, 1091 (1989) (holding that the notice of the right of first refusal was effective only after the holder of the right was notified of the true terms of the offer that the owners were willing to accept).

¶ 52 First 38 urges that we find that a "complete" copy of the PH1 Agreement, under the ROFR, would have included the earnest money deposit or receipt of deposit and any other documents referenced as being "attached" to the PH1 Purchase Agreement signed by the Geracis. There is no language contained in the ROFR, however, that reflects any agreement between First 38 and NMPC regarding the seller's obligation to validate or verify, to the holder of the ROFR, the third party offeror's financial ability to close, or its financial status or commitment to the purchase of the property. And we will not second guess the parties' intent contrary to the language of the ROFR, where, in this case, the language contains no reference whatsoever to the

earnest money deposit or the ability to close or any other indicia of the offeror's financial competence.

¶ 53 Moreover, there is nothing in the entire ROFR from which we can infer that the reference to "an executed copy of the offer" means a copy of "an offer, including the earnest money deposit check or receipt that was tendered." A right of first refusal is a restraint on alienation of property, and will be strictly construed against the holder of the right. *Gatton v. Page*, 44 Ill. App. 3d 559, 562 (1976). If First 38 had wanted to obtain proof necessary for it to conduct its due diligence before electing to match the offer, First 38 should have required the language of the ROFR to reflect its intent that it receive a "third party offer, including all attachments and attachments required by NMPC to be considered an acceptable bona fide offer herein," or something to that effect. But that is not what the ROFR provides. And there is no evidence elsewhere in the ROFR of such an agreement by the parties.

¶ 54 In light of the above, we conclude that in order to trigger First 38's obligation to act, the ROFR required NMPC to provide First 38 with a copy of a third party offer that NMPC had determined was acceptable and bona fide, and that NMPC was not required to provide First 38 with proof that the offer was acceptable and bona fide. It is well-settled that "a court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented." *Thompson v. Gordon*, 241 Ill. 2d 428, 449 (2011). In addition, "there is a presumption against provisions that easily could have been included in a contract but were not." *Id.* Had the parties agreed to impose a duty on NMPC to submit a complete copy of a third party offer that provided evidence of the *bona fides*—the "good faith" element of the offer—here, the initial earnest money deposit or other security to bind the seller to the offer, the parties could have expressly included language imposing such an obligation in the

ROFR, but did not. We conclude that First 38 was not entitled, under the ROFR, to anything more than a copy of the signed PH1 Purchase Agreement with redacted identifying information.

¶ 55 C. Performance by the Parties

¶ 56 Turning to the question of whether NMPC properly performed under the ROFR and triggered First 38's obligation to act, we conclude that, based on our interpretation of the ROFR, NMPC's June 3, 2014 tender of the redacted copy of the PH1 Purchase Agreement with redacted identifying information was sufficient to constitute "an executed copy" of the "Third Party Offer" under the ROFR, and triggered First 38's duty to match the terms of the offer.

¶ 57 The record shows that on June 3, First 38 received a redacted, signed copy of the PH1 Purchase Agreement that included all the material terms of the third party offer tendered by the Geracis, including: the property to be purchased (PH1), the purchase price (\$8,632,000), the required amount for the earnest money deposit (\$862,300), the number of parking spaces included in the price (five), and the closing date (June 25, 2014). The copy tendered to First 38 indicates that the third party offeror executed the offer as required by the ROFR, and only parts of the offer which purportedly contained the offeror's identity or other personal information are redacted. As previously discussed, First 38 had agreed that "the name (and contact or other personal information)" of the third party offeror could be "redacted as necessary for confidentiality purposes."

¶ 58 We find that the acknowledgment contained in the PH1 Purchase Agreement regarding the third party offeror's payment of the earnest money deposit signals the offeror's readiness and willingness to purchase the unit, and validates NMPC's assertion that the Geracis' offer, as memorialized in the PH1 Purchase Agreement, was "an acceptable, bona fide offer to purchase [PH1]." And *that* was all that NMPC was obligated to submit to First 38: a copy of the offer, not

proof of an irrevocable "security" deposit or some other "bona fide" consideration given by the Geracis to establish a binding contract on both NMPC and the Geracis. This court concludes that NMPC gave proper notice of a bona fide offer to First 38 on June 3, 2014.

¶ 59 Because we hold that First 38 was given proper notice under the ROFR, we must next examine whether First 38 satisfied its obligation to match the terms of the Third Party Offer, i.e., the PH1 Purchase Agreement, prior to the expiration of the right on June 4, 2014, at the close of the business day.

¶ 60 Pursuant to Section B of the ROFR, First 38 had the right to execute a Condominium Purchase Agreement on "the same terms and conditions" as those contained in the PH1 Purchase Agreement "within one (1) business day" after First 38 received Loewenstein's June 3 letter and a copy of the PH1 Purchase Agreement. Accordingly, First 38 had until close of business the next day, June 4, 2014, to execute a form Condominium Purchase Agreement for PH1 that matched the Geracis' offer. Despite First 38's stated intention, through Goldstein, that it was "ready and willing" to match the offer and execute a purchase agreement "on the same terms," First 38 did not submit an executed purchase agreement.

¶ 61 Instead, Goldstein requested an unredacted version of the Geracis' offer, which First 38 was not entitled to. Then, Loewenstein provided First 38 with an extra day, until 5 p.m. on June 5, 2014, to execute a purchase agreement for PH1 with the same terms as the Geracis' third party offer, and First 38 still failed to do so. Because First 38 failed to act in accordance with the ROFR and did not execute a purchase agreement with the same terms as the Geracis' offer, we find that First 38 forfeited its right of first refusal to purchase PH1.

¶ 62 First 38's reliance on *Lake Shore Club of Chicago v. Lakefront Realty Corp.*, 79 Ill. App. 3d 918 (1979) is misplaced. In that case, the Lakefront Realty Corporation (Lakefront) owned

the land and buildings at 850 North Lake Shore Drive (the 850 Property). *Id.* at 920. In 1971, Lakefront entered into a lease and option to purchase agreement for the 850 Property (the agreement) with the Lake Shore Club of Chicago (the Club). *Id.* Pursuant to the agreement, the term of the lease extended from June 30, 1973, "up to and including June 30, 1977." It was during the effective term of the lease that "the Club was given the right and option to purchase the 850 Property *** for consideration specified in the agreement." *Id.* As set forth in the agreement between Lakefront and the Club, the right and option to purchase provided as follows:

"The Lessor may, without the consent of the Lessee, sell the PROPERTIES at any time subsequent hereto to a purchaser other than the Lessee subject to the following conditions:

(a) That the Lessor shall send a notice in writing to the Lessee that it has received a written offer to purchase the PROPERTIES, which offer has been approved for acceptance, subject to the rights of the Lessee hereunder, by the Board of Directors of the Lessor and its Stockholders, to which notice a copy of such offer made to the Lessor shall be attached."

Lakefront received an offer from Northwestern University to purchase the 850 Property, and in March 1977, the parties entered into a sales contract for the 850 Property. *Id.* at 921. The sale was approved by two-thirds of Lakefront's shareholders, "all of whom were also members of the Club." *Id.* On June 30, 1977, the Club brought suit against Lakefront, seeking specific performance of its right to purchase the 850 Property and to enjoin Lakefront from selling it to Northwestern. *Id.* After an evidentiary hearing, the circuit court ruled against the Club and allowed Lakeshore and Northwestern to proceed to sale on the property. *Id.* at 923.

¶ 63 On appeal, the reviewing court noted that "[g]enerally, the 'ready, willing, and able' standard is applied in assessing whether an offer is bona fide." *Id.* at 924. "In order to meet this standard, the purchaser must be able to command, in his own name, the funds necessary to perform the offer." *Id.* The appellate court concluded that the Club's offer to purchase the 850 Property was not bona fide, because the Club could not command, in its own name, the funds to close on the property; in fact, its offer to purchase the property relied on the sale of the property to a third party, which would *then lease* the property back to the Club. *Id.* at 924-25. In addition, although Northwestern's offer to purchase the 850 Property was not attached to the notice that Lakefront sent to the Club, the appellate court did not disturb the circuit court's finding that the Club had received "the equivalent of proper notice." *Id.* at 923.

¶ 64 Whereas in *Lake Shore Club*, the right and option to purchase required the holder, the Club, to make a bona fide offer on the subject property, here the term "bona fide," as stated in the ROFR, refers to the offer received by NMPC from a third party offeror, which NMPC must determine to be bona fide, or made in good faith. Unlike the holder of the right to purchase in *Lake Shore Club*, here, First 38, as the holder of the right to purchase PH1 under the ROFR, has no involvement or right to intervene in NMPC's determination of whether the third party offer is bona fide.

¶ 65 In light of our determination that NMPC gave proper written notice of a "Third Party Offer" under the ROFR to First 38 on June 3, 2014, and that First 38 did not execute a standard Condominium Purchase Agreement by close of business on June 4, 2014, we find that First 38 did not submit an executed Condominium Purchase Agreement for PH1 within the time frame allowed under the ROFR, and, consequently, did not match the Third Party Offer on PH1.

¶ 66

D. Alleged Waiver and Discovery Ruling

¶ 67 We decline to consider the remainder of the Geracis' arguments, regarding First 38's alleged waiver of the requirement for proof of the earnest money deposit and the court's denial of their motion to compel the deposition of Larrea, as those issues are now moot based on our disposition in the case.

¶ 68

CONCLUSION

¶ 69 We find that NMPC satisfied its contractual duty under the ROFR to provide First 38 with notice of and a copy of the third party offer that NMPC considered to be acceptable and bona fide; therefore, First 38's rights and obligations under the ROFR were triggered on June 3, 2014. Additionally, we find that First 38 did not exercise its right to match the third party offer by close of business the next day. Therefore, First 38 forfeited this right and its option to purchase PH1 on the same terms and conditions as that contained in the PH1 Purchase Agreement dated June 2, 2013, expired at 5 p.m. on June 4, 2013.

¶ 70 We reverse the judgment of the circuit court and remand for further proceedings consistent with this order.